Supreme Court, U.S.
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No. 09-

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO PECK, a minor by and through his parents and next friends, JO ANNE PECK and KENLEY LESTER PECK,

Petitioner,

v.

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE MCNAMARA ELEMENTARY SCHOOL, MARY R. SCHILZ, in her official capacity as Principal of Catherine McNamara Elementary School, JEANNE DANGLE in her official capacity as Superintendent for Baldwinsville Central School District,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a student can be denied standing to continue his challenge of school officials' censorship of religious viewpoint in the student's work when the student remains enrolled in the school district and subject to the district-wide policy which results in viewpoint discrimination.

2. Whether a court of appeals can effectively overrule *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) by holding that a student must show that a school district regularly violates students' free speech rights in order to maintain a challenge of school censorship of religious viewpoint in the student's work.

3. Whether a court of appeals can use a procedural rule specifying the requirements for an appellate brief to find that a First Amendment claimant involuntarily waived his right to seek damages for deprivation of his free speech rights when he failed to mention damages in his brief.

PARTIES

The Petitioner is Antonio Peck, a minor, who is bringing this action through his parents and next friends JoAnne Peck and Kenley Lester Peck.

Respondents are the Baldwinsville Central School District, the Catherine McNamara Elementary School and Mary R. Schilz and Jeanne Dangle, the principal and superintendent, respectively, of the Baldwinsville Central School District.[1]

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[1] Robert Crème and Theodore Gilkey were originally named Defendants in their capacities as principal of Catherine McNamara Elementary School and Superintendent of the Baldwinsville Central School District, respectively. Both parties no longer work for the district, and the Second Circuit substituted the present principal, Mary R. Schilz, as a Defendant in her official capacity and the present superintendent, Jeanne Dangle, as a Defendant in her official capacity, and the caption has been changed to reflect the substitutions.

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The Second Circuit Court of Appeals' denial of rehearing or rehearing *en banc* is unpublished and is reproduced at Appendix p. 42a. The Second Circuit Court of Appeals' summary order is unpublished, but can be found at 2009 WL 3425215 and beginning at p. 1a of the Appendix. The District Court's order is unpublished, but is available at 2008 WL 4527598 and beginning at p. 8a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was filed on October 26, 2009. The order of the Court of Appeals denying rehearing or rehearing *en banc* was filed on December 11, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

For more than ten years Petitioner Antonio Peck ("Antonio") has been traversing procedural hurdles and enduring years of pending decisions while continuing his studies in the Baldwinsville Central School District beneath a cloud of chilled First Amendment speech. Just as he was nearing the end of the journey in the form of an appellate determination of the merits of his viewpoint discrimination claim, the Second Circuit slammed the courthouse door in his face. The court claimed that he had suddenly lost standing even though he remains a student in the district susceptible to the same district-wide policy that caused the censorship which is the subject of his complaint. The Second Circuit also created a new impossibly high standard for maintaining free speech challenges–that students must show that there is a "policy or custom (or an equivalent) suggesting that any defendant regularly violates students' free speech rights." (App., p. 6a). Finally, the Second Circuit used F. R. App. P. 28, which lists the requirements for appellate briefs, to deprive Antonio of his right to seek damages for Respondents' censorship of Antonio's work. (App., p. 5a n.1).

The extra-judicial rulings by the Second Circuit contravene this Court's clear precedent that students who remain under the auspices of school officials do not lose standing to challenge officials' actions. Furthermore, the Second Circuit's new

"policy of regular violations" burden of proof effectively overrules *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) so that student free speech challenges will be nearly impossible to maintain.

While a kindergartner in 1999, Antonio created posters in response to an assignment requesting artwork on ways to "save our environment." (App., pp. 14a-20a). Antonio's first poster was rejected because school officials found it to be clearly a religious picture with religious overtones. (App. p. 16a). Antonio submitted a second poster, which retained one feature from the initial poster, a figure of a kneeling man with hands pointed to the sky, in the lower left corner. (App., p. 19a). Antonio's teacher, Susan Weichert, and the school principal, Robert Crème, saw the kneeling figure as clearly religious and agreed to display the poster along with others at a school assembly to be attended by parents, but to fold over the figure of the kneeling man. (App., p. 20a). Notably, Mrs. Weichert was not concerned about the effect of the "clearly religious" figure on the kindergarten students since she displayed the complete poster in front of the kindergarten class without folding over the picture of the kneeling man. (App., p. 19a).

Mrs. Weichert and Mr. Crème said that they were concerned that *adults* viewing the poster on display with about 80 others would believe that they were teaching religion in kindergarten unless

the figure of the kneeling man was censored. (App., p. 20a) (emphasis added). Mrs. Weichert explained that she folded the picture of the kneeling man because she "felt that other *parents* could look at this poster and think, and make the leap that I was, in fact teaching religion in the classroom, which I was not." (App., pp. 20a, 23a) (emphasis added). She indicated that she would not have folded over other images such as a manatee because: "I can't imagine that there would have been any *parent* that would have objected to a manatee because they wouldn't have construed it as anything other than an animal ... Because it had no religious significance, ... therefore I wouldn't have had to worry about anybody being offended by-no strike, not be offended, anyone would surmise that I may have been teaching religion in kindergarten." *Peck v. Baldwinsville School Bd.*, 426 F.3d 617 (2d Cir. 2005) ("Peck II")(emphasis added). Superintendent Theodore Gilkey said that officials were concerned that by displaying the poster they would communicate to the *people at the assembly* that the school was endorsing religion or Jesus. (App., p. 21a). Principal Creme said that he also believed "that some people would have felt that we were teaching religion" if the picture of the kneeling man were displayed on one of 80+ posters on display. (App., p. 23a).

On November 1, 1999, Antonio filed a Complaint under 42 U.S.C. §1983 alleging that Respondents violated his rights to free speech, freedom of religion, equal protection and freedom

from hostility to religion under the Establishment Clause when they censored the religious viewpoint in Antonio's poster. Defendants immediately filed a motion to dismiss under Rule 12(b)(6). (App., p. 9a). The district court converted the motion into a Rule 56(b) motion *sua sponte* and granted summary judgment on all counts to Respondents. (App., p. 10a). The Second Circuit vacated that judgment and remanded the case to the district court for discovery and further decision. *Peck v. Baldwinsville School Bd. of Educ.*, 7 Fed.Appx. 74 (2d Cir. 2001)("Peck I").

Once discovery was completed, Respondents moved for summary judgment. (App., p. 10a). The matter remained fully briefed and under submission for twenty-two months until the district court granted Respondents' Motion for Summary Judgment and dismissed Antonio's complaint. (App., pp.10a, 44a).

Antonio again appealed to the Second Circuit, which reversed the district court's dismissal of Antonio's free speech claim. *Peck II*, 426 F.3d 617. The Second Circuit found that the facts of the case implicated a "troubling concern: the viewpoint neutrality of The District's decision with respect to Antonio's poster." *Id.* at 630. The Second Circuit found that:

> The district court overlooked evidence that, if construed in the light most favorable to Pecks, suggested that Antonio's poster was censored not

> because it was unresponsive to the assignment, and not because Weichert and Creme believed that JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment.

Id. The court found that there were disputed facts as to whether Antonio's poster offered a "religious viewpoint," and whether, if the poster had depicted a purely secular image that was equally outside the scope of the environmental lessons it would similarly have been censored. *Id.* at 631. The Second Circuit acknowledged that the district's censorship of Antonio's work might have a legitimate pedagogical basis. *Id.* However,

> We think that it is also possible to interpret the testimony of Weichert and Creme as indicating that they were particularly disposed to censor Antonio's poster because of its religious imagery and that they would not necessarily have similarly censored secular images that were equally non-responsive. Were these facts ultimately proved, The District's actions might well amount to viewpoint discrimination.

Id. The court concluded "that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical

interests." *Id.* at 633. In remanding the viewpoint neutrality question, the Second Circuit directed the district court to ascertain whether Respondents' actions were necessary to avoid an Establishment Clause violation, and if so, whether avoidance of that violation was a sufficiently compelling state interest to justify viewpoint discrimination by Respondents. *Id.* The Second Circuit emphasized that:

> What is a compelling state interest is certainly informed by the fact of a school context and the presence of minor children. In gauging whether there is a compelling state interest though, *courts must be exceedingly careful to be sure that the asserted compelling state interest is directly concerned with the state's desire to protect the children in the school and is not motivated by the wish to suppress speech the school and the state do not like.*

Id. at 633 n.11 (emphasis added). That admonition from the Second Circuit was particularly important in light of the fact that Respondents testified that their concern was not the effect of Antonio's poster on the other students, but on adults who might view the poster and believe that Mrs. Weichert was teaching about religion. (App., pp. 20a-24a).

The District Court held a bench trial on January 29, 2007 on the free speech claim. (App., p.

10a). Respondents again testified that they censored Antonio's poster because they were concerned that adult observers would believe that they were teaching religion in kindergarten. (App., pp. 23a-27a). Respondents again made it clear that their concern was *not* how the religious image would affect Antonio's fellow kindergarteners, who had already seen the uncensored poster. (App., pp. 23a-27a). In other words, Respondents established that their concern was not to protect the children in the school, but to protect themselves from possible adult misperception about religion being taught in school. (App., pp. 23a-27a).

Twenty months after trial, on September 30, 2008, the District Court entered judgment in favor of Respondents. (App., pp. 40a-41a). Despite the Second Circuit's admonition to the district court to be exceedingly careful to ensure that "the asserted compelling state interest is directly concerned with the state's desire to protect the children in the school and is not motivated by the wish to suppress speech the school and the state do not like," the district court acknowledged that the Respondents' interest was not in protecting children, but in protecting themselves from the misperceptions of adult visitors. (App., pp. 38a-39a). Nevertheless, the district court found that the interest was legitimate so that there was no impermissible viewpoint discrimination. (App., pp. 38a-39a). Based upon that finding, the district court dismissed the free speech claim. (App., pp. 38a-39a).

Antonio appealed again to the Second Circuit. Instead of ruling on the merits, however, the appellate panel determined that Antonio no longer had standing, based upon *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983) and other criminal procedure cases. (App., pp. 6a-7a). On October 26, 2009, the Second Circuit issued a summary order vacating the district court order and remanding the case to the district court for dismissal based upon lack of subject matter jurisdiction. (App., pp. 6a-7a). The Second Circuit further held that Antonio lacked standing because: "He points to no policy or custom (or an equivalent) suggesting that any defendant regularly violates students' free speech rights. *See Shain[v. Ellison]*, 356 F.3d [211,] at 216 [(2d Cir. 2004)]. Nor has he offered a reason to believe that he faces a 'reasonable likelihood' of future harm. *Id.* at 215." (App., p. 6a). In a footnote the Second Circuit held: "In his original complaint, Antonio also sought damages. In his brief to this Court, however, he asks for declaratory and injunctive relief only. He has therefore waived any claim for damages. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998)." (App., p. 5a n.1).

The court did not provide any analysis to support its new burden of proof. Nor did the court explain its conclusion that Antonio, who is still enrolled in the district, does not face a reasonable likelihood of again having his work censored to prevent adult observers from believing that the school teaches religion.

Antonio sought rehearing, or, alternatively, rehearing *en banc*, arguing that the Second Circuit's conclusion conflicted with this Court's ruling in *Honig v. Doe*, 484 U.S. 305 (1988) and student free speech precedents. The Second Circuit denied rehearing on December 11, 2009. (App., pp. 42a-43a).

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS WHEN IT RULED THAT A STUDENT WHO IS STILL ENROLLED IN A SCHOOL DISTRICT AND SUBJECT TO A DISTRICT-WIDE POLICY THAT RESULTS IN VIEWPOINT DISCRIMINATION HAS LOST STANDING TO CHALLENGE THE DISTRICT'S CENSORSHIP.

The Second Circuit's conclusion that Antonio does not have standing to continue with his challenge of Respondents' censorship directly conflicts with this Court's rulings which establish that a party retains standing if there is a reasonable expectation that he will again suffer the kind of injury which precipitated the lawsuit. *Honig v. Doe*, 484 U.S. 305, 318-321 (1988). The burden of proving that there is no reasonable expectation that the wrong will be repeated is "a heavy one." *United States v. W. T. Grant Co.*, 345

U.S. 629, 633 (1953) Statements that a policy has been changed or that the challenged conduct will not be repeated are not sufficient. *Id.* Instead, it must be "absolutely clear that, absent the protective action of a court, the allegedly wrongful behavior could not reasonably be expected to recur." *Vitek v. Jones*, 445 U.S. 480, 487 (1980).

In *Honig*, this Court held that there was a reasonable expectation that a student would again face discriminatory conduct by a school district even though he was not enrolled in school at the time of the decision. *Honig*, 484 U.S. at 320. The disabled student remained eligible for public school services under the Education of the Handicapped Act ("EHA") until he completed high school or turned 21. *Id.* Until that time, he faced the possibility that he would enroll in public school and be subject to the same impermissible conduct that precipitated the lawsuit. *Id.* The fact that he was not presently enrolled in school and had moved to another school district within the state did not affect his continued standing to assert claims against state education officials. *Id.*

In this case, Antonio is still enrolled in the same school district which is the subject of this action and therefore remains susceptible to the same kind of religious censorship that precipitated his lawsuit. This is particularly true in light of the fact that Respondents censored Antonio's artwork because of their concern that adults would misperceive that Respondents were teaching religion in school, not because they were concerned

that the students would be exposed to religious doctrine. The concern about adults misperceiving student speech remains throughout a student's tenure in a school district. It does not disappear when a student progresses from kindergarten to grade school or grade school to high school. So long as Antonio remains a student in the Baldwinsville district he remains subject to the district's policy that because adults might misperceive that the school teaches religion the district will censor religious viewpoints in student work. Therefore, so long as Antonio remains a part of the district, there is a reasonable expectation that he will again face censorship of religious viewpoint in his school work. Under *Honig* he still has standing to pursue his claims for injunctive relief, declaratory relief and damages.

Instead of following the controlling precedent in *Honig*, the Second Circuit relied upon criminal procedure cases to conclude that Antonio no longer has standing to seek injunctive and declaratory relief. (App., pp. 5a-6a, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983); *DeShawn v. Safir*, 156 F.3d 340 (2d Cir. 1998); *Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004)). However, as this Court explained in *Honig*, the standing principles in criminal procedure cases are not analogous to principles applied in students' rights cases. *Honig*, 484 U.S. at 320. "[F]or purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the

type of misconduct that would once again place him or her at risk of that injury," e.g., being stopped and resisting arrest, as in *Lyons*. *Id.* However, when the challenged act does not require that the claimant engage in misconduct, this Court is more willing to assume that the plaintiff will again face a deprivation of rights at the hand of the defendant. *Id.* Therefore, a student who still has the right to a free and appropriate public education retains standing to challenge impermissible denials of that right regardless of whether he is currently enrolled in a public school. *Id.*

In contravention of this Court's explanation of the differential analysis between criminal procedure and student rights cases, the Second Circuit relied upon *Lyons*, a criminal procedure case, to conclude that Antonio did not have standing. In *Lyons*, the defendant could not establish standing for injunctive relief against a police chokehold policy unless he could demonstrate that the he was going to be stopped by police, resist arrest and be placed in an illegal chokehold. *Lyons*, 461 U.S. at 110-111. That series of unlikely events, beginning with engaging in a criminal act, was too speculative to confer standing to seek injunctive relief. *Id.* Similarly, in the other cases cited by the Second Circuit, the criminal defendants were denied standing because there was nothing more than speculation that they might engage in criminal activity and be subjected to improper police techniques in the future. *Shain*, 356 F.3d at 216 (challenging policy of strip searching arrestees); *Curtis v. City of New Haven*, 726 F.2d

65, 68 (2d Cir.1984) (challenging the use of mace against arrestees).

Unlike the criminal defendants in *Lyons*, *Shain* and *Curtis*, students like Antonio do not need to prove a series of unlikely events, such as being stopped by police, resisting arrest and being placed in a choke hold, in order to have standing to challenge school officials' censorship. Instead, as this Court said in *Honig*, students need only establish that they remain subject to the school policy that led to the censorship of their work so that there is a reasonable expectation that the discriminatory act will recur. *See Honig*, 484 U.S. at 318. In cases such as this, in which school officials censor student work out of fear of adult misperceptions instead of concern for effects upon other students, it is particularly likely that a student will be susceptible to further censorship so long as he is under the auspices of the school district. Under these circumstances, the Second Circuit's conclusion that a student can lose standing due to the passage of time is particularly troubling and would sanction the chilling of student speech any time a school official is worried that some third party observer might mistakenly believe that the school teaches religion. This would grant school districts a broad power of censorship and create the kind of "heckler's veto" that this Court has warned against. *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

In *Honig*, this Court specifically stated that the standing principles in *Lyons* do not apply to

student rights cases. *Honig*, 484 U.S. at 320. The Second Circuit directly contravened *Honig* when it used *Lyons* to deprive Antonio of standing for his student rights claim. The Second Circuit's reliance upon *Lyons* to dismiss Antonio's declaratory relief and damages claims even contravenes *Lyons*, which held that the petitioner lacked standing for injunctive relief but still had standing to seek damages for prior injuries. *Lyons*, 461 U.S. 105-106.

The Second Circuit heard two prior appeals in the case, and implicitly recognized that Antonio had standing at least through 2005 when it issued its opinion in *Peck II*. However, according to the court, at some point between 2005 and 2009 Antonio lost standing to pursue his claims. There was no change in his status as a student in the district nor any other reason offered for closing the courthouse door. Consequently, under the Second Circuit's ruling, students can lose standing to challenge free speech violations for unknown reasons at some unspecified time after they file their complaint but before they stop being a student. That arbitrary standard contravenes this Court's protection of freedom of speech as one of the fundamental personal rights and liberties accorded to all citizens. *Schneider v. State*, 308 U.S. 147, 161 (1939). Students are unable to remedy violations of their free speech rights if the courthouse door is slammed in their face prematurely and without notice.

The procedural history of this case makes the Second Circuit's ruling all the more egregious. Antonio filed this action in 1999, and even before discovery was commenced the district court attempted to grant summary judgment in favor of the school district. (App., pp. 9a-10a). Antonio had to appeal that decision while continuing as a student in the Baldwinsville district. Following remand from the first appeal, the parties completed discovery and Respondents filed a motion for summary judgment. (App., p. 10a). The motion was fully briefed and taken under submission by the court on October 16, 2002. (App., p. 44a). The motion remained under submission for nearly two years until the district court issued its decision on August 16, 2004. (App. p. 44a). Throughout that time, Antonio continued his studies in the Baldwinsville district, susceptible to having his schoolwork censored. After remand from the second appeal, the district court conducted a trial in January 2007. (App., p. 10a). Another twenty months went by before the district court issued its decision on September 30, 2008. (App., pp. 40a-41a). For nearly four years, Antonio's claims were stalled in the district court while Antonio progressed through the Baldwinsville district, susceptible to further censorship. Antonio finally received a judgment on the merits from the district court and could move toward further resolution from the Second Circuit. However, instead of resolving the case, the Second Circuit told Antonio it was too late and slammed the door.

In so doing, the Second Circuit punished Antonio for delays that were entirely outside of his control. Furthermore, by ruling that Antonio lost standing while awaiting rulings from the district court, the Second Circuit rewarded dilatory conduct. If the ruling remains unchallenged, then delay will become a new weapon against students seeking to uphold their free speech rights. Students' rights will be chilled while motions remain under submission for months or years, and then courts will decide it is too late to address the violation. Since the deprivation of First Amendment rights for "even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Second Circuit's sanctioning of delay and dismissal is potentially devastating for any First Amendment plaintiff whose speech will be chilled -- possibly forever.

This Court should grant certiorari to overturn the Second Circuit's ruling and clarify that the standing principle in *Honig* must be followed when free speech rights are at stake.

II. THE SECOND CIRCUIT CONTRAVENED ITS OWN AND OTHER CIRCUITS' PRECEDENTS WHEN IT RULED THAT A STUDENT WHO IS STILL ENROLLED IN A SCHOOL DISTRICT AND SUBJECT TO A DISTRICT-WIDE POLICY THAT RESULTS IN VIEWPOINT DISCRIMINATION HAS LOST STANDING TO CHALLENGE THE DISTRICT'S CENSORSHIP.

The Second Circuit panel contradicted its own and sister circuits' precedents when it held that Antonio, who remains a student in the District, no longer has standing to pursue his claims against the District's censorship of his artwork. Other Second Circuit panels, as well as other circuit courts, have consistently followed *Honig* to reject attempts to deny standing to parties who show a reasonable expectation that wrongful conduct would recur.

A. The Second Circuit's Determination That Antonio Lacks Standing Directly Conflicts With Rulings From Other Second Circuit Panels.

The most glaring example of the intra-circuit conflict the panel decision created can be seen by comparing the decision below with another Second

Circuit panel's decision in *Heldman v. Sobol*, 962 F.2d 148, 157 (2d Cir. 1992). In a case with facts substantially similar to those in *Honig*, the Second Circuit correctly found that a student who was not presently enrolled in school but still qualified for services from the school still had standing to pursue his claims that the school violated his statutory rights. *Id.* Notably, the Second Circuit found that the student's claims were not moot even though he was **not** presently enrolled, while in this case the Second Circuit found that Antonio's case was moot even though he **is** presently enrolled. (App., p. 6a).

Antonio's status also resembles that of the plaintiffs in *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 285 (2d Cir. 2004), in which the Second Circuit found that students could still pursue their claims because they were still enrolled and could still participate in the challenged program. The students in *McCormick* were juniors in high school and therefore could still benefit from the court's decision regarding the sports program. *Id.* Like the students in *McCormick*, Antonio is still enrolled in the District and still has standing. The panel's contrary conclusion contradicts its own as well as this Court's precedents.

The Second Circuit has similarly followed *Honig* in non-school contexts where the petitioner's status changed during the course of the litigation, but there was a reasonable expectation that the challenged conduct would recur. *See, e.g., Fulani v.*

League of Women Voters Educ. Fund, 882 F. 2d 621, 628 (2d. Cir. 1989) (finding that the party's claims were not moot despite the conclusion of an election since the same effects on minor party candidates would persist in future elections); *Seibert v. Sperry Rand Corp.*,586 F.2d 949, 951 (2d Cir. 1978) (finding that a party's claim was not moot despite a referendum having occurred because there was a reasonable expectation that he would be subject to an identical order if another referendum were scheduled). Each of these Second Circuit cases, like *Heldman*, are notable because the status of the parties at issue, *e.g.*, a disabled child enrolled in school, a minor party candidate, had changed, while Antonio's status as a student enrolled in the District has not changed. That makes the Second Circuit's conclusion that Antonio lacks standing to proceed all the more egregious and the intra-circuit conflict all the more serious.

B. The Second Circuit's Determination That Antonio Lacks Standing Conflicts With Other Circuits' Decisions That Properly Rely Upon *Honig* To Analyze Standing.

The Second Circuit's conclusion that Antonio lacks standing to proceed with his free speech claims also conflicts with other circuit courts which have followed *Honig* and concluded that plaintiffs in circumstances similar to Antonio's have standing to pursue their claims.

The Seventh Circuit's use of *Honig* to analyze a student rights claim and find that the student did not have standing particularly illustrates the conflict between the Second Circuit's ruling and other circuit precedents which correctly apply and follow *Honig. Bd. of Educ. of Downers Grove Grade School Dist. v. Steven L.*, 89 F.3d 464, 467-68 (7th Cir. 1996). In *Steven L.*, the Seventh Circuit properly relied upon *Honig* to determine that the student did not have standing. *Id.* The facts in *Steven L.* were distinguishable from *Honig* (and from this case) in that the student had received the services necessary to meet his needs throughout his tenure in grade school so that there was no reasonable expectation that he would be denied services by the grade school district at issue. *Id.* The grade school district defendants no longer had authority over the student's educational program and so could not deprive him of services again. *Id.* Therefore, under *Honig*, that student no longer had standing against the named grade school district. *Id.*

By contrast, in this case, the district consists of schools from kindergarten through grade 12, so it still has authority over Antonio's educational program and there is a reasonable expectation that Antonio will face censorship of religious viewpoint in his schoolwork. The Baldwinsville district's policy of censoring religious viewpoint to avoid adults' misperceptions about the teaching of religion remains a threat to Antonio's First

Amendment rights. Consequently, there is a reasonable expectation that he will again suffer censorship at the hands of school officials. Under the Seventh Circuit's analysis of *Honig*, Antonio has standing to pursue his claims. The Second Circuit's contrary conclusion, as well as its refusal to rely upon *Honig*, places it in conflict with the Seventh Circuit.

The Second Circuit's ruling also conflicts with a similar student rights case in which the First Circuit found that a student could still face denial of rights from the school district and therefore had standing under *Honig*. *Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 757 (1st Cir. 1990). The decision also conflicts with decisions in the Third and Sixth Circuits which applied *Honig* to find that those seeking elective office had standing to pursue their claims despite the fact that the challenged election had concluded. *Reich v. Local 30, Int'l Brotherhood Of Teamsters*, 6 F.3d 978, 984-985 (3d Cir. 1993) (finding that union member had reasonable expectation of being declared ineligible for office under union rule that remained in effect, even though the challenged election was over). *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2006) (finding that independent candidate and voter in recently completed election could reasonably expect to suffer same alleged harm from state election law in future elections).

The Second Circuit's failure to rely upon the controlling precedent in *Honig* and its conclusion

that Antonio does not have standing both conflict with other circuits' decisions which have consistently held that *Honig* is the proper standard for analyzing questions of standing in civil rights claims, and that under *Honig* civil rights plaintiffs do not lose standing merely by the passage of time or a change in status. This Court should grant certiorari to resolve the conflict and clarify that *Honig*, not criminal procedure precedents, is to be utilized to determine whether civil rights plaintiffs still have standing.

III. THE COURT OF APPEALS EFFECTIVELY OVERRULED *ELROD, TINKER* AND OTHER FREE SPEECH PRECEDENTS WHICH FIRMLY ESTABLISH THAT THE GOVERNMENT BEARS THE BURDEN OF PROVING THAT RESTRICTIONS ON SPEECH ARE JUSTIFIED.

The Second Circuit's newly minted burden of proof for maintaining a free speech challenge effectively overrules *Elrod, Tinker* and other free speech precedents by creating a new rule that no challenge may proceed unless a student can prove that any school official "regularly violates students' free speech rights." (App., p. 6a). The Second Circuit's standard contradicts this Court's precedents that school officials, not students, bear the burden of proof when free speech rights are affected and that single acts of censorship are sufficient to bring a First Amendment challenge.

Tinker, 393 U.S. at 506; *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864-865 (1982).

A. The Second Circuits' Requirement That Students Prove Regular Violations Of First Amendment Rights Impermissibly Shifts The Burden Of Proof From The School District To the Student.

This Court has recognized that the special characteristics of the school environment warrant some regulation of student speech in the context of school-sponsored activities, curriculum and extra-curricular activities. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), *Morse v. Frederick*, 551 U.S. 393 (2007). However, it has emphasized that "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Pico*, 457 U.S. at 864-865. "Boards of Education ... have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to

discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S. 624. 637 (1943).

In each of these cases, as in *Tinker*, this Court has emphasized that it is up to school officials to justify restrictions on student speech, not the burden of students to prove that school officials regularly violate student rights. In the context of student speech that happens to occur on campus, this Court explained that:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Tinker, 393 U.S. at 509. In the absence of a specific showing by school officials of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. *Tinker* 393 U.S. at 511.

While *Bethel, Kuhlmeier* and *Morse* recognized that school officials have more control over school-sponsored speech in various contexts, they retained the underlying principle that school officials have the burden of proving that actions which affect student free speech rights are justified by compelling state interests. *See Elrod*, 427 U.S. at 362 (when governmental conduct interferes with First Amendment expression, the *burden is on the government* to prove that its action advances an interest that is paramount and of vital importance) (emphasis added). In *Bethel*, this Court found that the district had met its burden of showing that its discipline of a student was justified by the school's interest in protecting students against vulgar and offensive language. *Bethel*, 478 U.S. at 685. In *Kuhlmeier*, this Court held that school officials could exercise control over the content of a school newspaper, but emphasized that officials had to show that "their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273. In *Morse*, this Court held that the school had met its burden of showing that its actions against the student were reasonably related to the district's responsibility to restrict speech that promotes use of illegal drugs. *Morse*, 551 U. S. at 408. The *Morse* court acknowledged that "'undifferentiated fear or apprehension of disturbance'" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not enough to justify deprivation of students' First Amendment

rights, and that the district's concern about not promoting the use of illegal drugs was more than that. *Id.* (quoting *Tinker*, 393 U.S. at 508).

The same is not true here. The only justifications that Respondents offered for censorship of the religious viewpoint in Antonio's work were fear of disturbance in the form of potential parental misperception that religion is taught in the school and a desire to avoid the discomfort that might arise if parents thought that the district was teaching religion. (App., p. 20a-24a). Those concerns are not sufficient to trump Antonio's free speech rights under *Tinker*. Respondents did not meet the burden of proof under any of this Court's student speech precedents.

This Court's protection of student free speech rights in *Tinker*, even as tempered by *Kuhlmeier*, *Bethel* and *Morse*, should have led the Second Circuit to find that school officials failed to meet their burden of justifying restrictions upon Antonio's speech. Instead, the court attempted to overrule *Tinker* by shifting the burden of proof from the school to the student and then making the burden so onerous as to effectively prevent any student from satisfying it. It is unlikely, even improbable, that an elementary or secondary school student would be able to establish that school officials regularly violate students' First Amendment rights. Furthermore, placing the burden on the students is a derogation of the

federal courts' duty "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The Second Circuit's adoption of a student-based burden of proof conflicts with the holdings and the underlying constitutional tenets of *Tinker*, *Kuhlmeier*, *Bethel* and *Morse*. This Court should grant certiorari to resolve the conflict and solidify the foundational First Amendment principles upon which student free speech rights are grounded.

B. The Second Circuit's Ruling That Students Must Prove Regular Violations Of Students' Free Speech Rights Contradicts Core Free Speech Principles.

The Second Circuit further undermined core First Amendment principles when it concluded that standing to challenge censorship of religious viewpoint required proof that Respondents regularly violated students' rights. (App., p. 6a). Requiring multiple violations of free speech rights to acquire standing contravenes the fundamental nature of First Amendment freedoms by forcing citizens to tolerate repeated violations before seeking judicial relief. This Court's determination that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable injury," *Elrod*, 427 U.S. at 373, necessarily means that plaintiffs need not wait for a pattern of violations before filing suit. In fact, in *Elrod*, this Court found that demonstrated threats of infringement of free speech rights were sufficient to support a First Amendment claim. *Id.*

The federal courts' duty to safeguard the fundamental values of freedom of speech as described in *Epperson* necessarily includes the duty to safeguard student free speech rights. *See Epperson*, 393 U.S. at 104 (describing the courts' duty in school speech cases). That means that when students allege a single incident of censorship, as in this case, or a demonstrable threat of censorship, as did the workers in *Elrod*, it should be sufficient to support a First Amendment claim. This Court's student speech precedents have reflected that principle by deciding free speech challenges based upon single incidents, not only upon proof of a pattern of violations. *See Tinker*, 393 U.S. at 511 (finding a First Amendment violation in disciplinary action following one incident of silent protest); *Bethel*, 478 U.S. at 685 (finding that the student had standing from a single incident of discipline following a speech, but finding no First Amendment violation); *Kuhlmeier*, 484 U.S. at 273 (finding that the students had standing after a single incident of censorship but finding no violation); *Morse*, 551 U.S. at 408 (finding standing following a single incident of discipline following display of a banner but finding no violation).

Under the Second Circuit's standard, none of the students in this Court's seminal student speech cases would have been permitted to pursue their claims. The students in *Tinker* would have lacked standing because there was no evidence that Des Moines school officials had regularly censored students' silent protests. The speaker in *Bethel* would have not been able to challenge censorship of his speech without proof that the school regularly disciplined students who gave speeches during school assemblies. The student journalists in *Kuhlmeier* would not have been permitted to test the limits of school censorship of student newspapers unless and until there was evidence of a pattern of censorship. Mr. Morse would not have been able to assert his rights without evidence that the school regularly confiscated banners and suspended students for conduct during extra-curricular events. In other words, if the Second Circuit's standard were to prevail, students who have had their speech censored or prohibited would have to conduct forensic investigations, possibly spanning years, in order to compile sufficient evidence to perhaps satisfy the court that officials "regularly"(whatever that means) censor or prohibit student speech before the student can even enter the courthouse. Meanwhile, the initial opportunity for free speech would be long gone and any other plans for free expression chilled.

Far from fulfilling its duty to safeguard First Amendment freedoms in the school setting, the Second Circuit has set student free speech back at

least forty years. The Second Circuit's new "pattern of violations" prerequisite for standing effectively overrules *Tinker* and its progeny by giving school officials permission to violate student speech rights once or even a few times before being liable for First Amendment violations. This will embolden school officials who will see a new way to circumvent the rights established in *Tinker* and control student speech. This Court should grant certiorari to resolve the conflict with *Tinker* and to clarify the appropriate burden of proof in student free speech cases.

IV. THE SECOND CIRCUIT CONTRAVENED THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS PROTECTING THE FULL RANGE OF REMEDIES FOR FIRST AMENDMENT VIOLATIONS WHEN IT HELD THAT ANTONIO WAIVED HIS CLAIM FOR DAMAGES.

This Court's zealous protection of First Amendment freedoms includes protection of the full range of remedies to redress deprivations of those fundamental rights. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 893 (2010). Federal Rule of Civil Procedure 54(c) provides that final judgments should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings. In contravention of these principles, the Second Circuit concluded that Antonio was barred from

seeking damages under Fed. R. App. P. 28(a), because he did not mention damages in his opening brief. (App., p. 5a n.1).

That parenthetical dismissal of Antonio's damages claim directly conflicts with this Court's ruling that remedies cannot even be voluntarily waived when a First Amendment challenge remains viable. *Citizens United,* 130 S.Ct. at 893. . As this Court said in *Citizens United,* once a federal claim is properly presented, a party can make any argument in support of that claim; it is not limited to arguments raised below. *Id.* "The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved." *Id.* If the parties cannot voluntarily agree to waive certain remedies, then they cannot be compelled to indirectly and involuntarily waive them by failing to specifically mention them in a brief, as the Second Circuit claims.

Furthermore, the Second Circuit and other circuits have interpreted Fed.R. Civ. P. 54(c) as permitting the granting of whatever relief the court deems appropriate in accordance with its findings regarding liability, regardless of whether the relief was specifically sought in the complaint. *Columbia Nastri & Carta Carbone, S/p/A v. Columbia Ribbon & Carbon Manufacturing Co., Inc.,* 367 F.2d 308, 312 (2d Cir. 1966). In the *Columbia* case, the Second Circuit held that the district court could award damages even though the party did not seek monetary relief in its counterclaim. *Id.* Similarly,

the First Circuit held that a district court properly awarded damages even though the complaint sought only declaratory relief and "such other and further relief as is equitable in the premises." *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981). Citing *Columbia*, the *Marin* court said that Rule 54(c) has been liberally construed, "leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved." *Id.* The Fourth Circuit held that there are only two principles which could justify a waiver of damages or other relief not explicitly requested: 1) That a remedy not desired by either party should not be thrust upon them and 2) The failure to ask for certain relief prejudiced the other party. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971). Since Antonio specifically sought damages in his Complaint, neither of these principles apply, so the liberal construction adopted by the Second Circuit in *Columbia* governs this case, contrary to the Second Circuit's conclusion below that Antonio somehow waived his damages claim by failing to reference damages in an appellate brief.

The Second Circuit's conclusion also directly conflicts with its earlier rejection of the use of Rule 28 to preclude remedies not mentioned in an opening brief. *Tabbaa v. Chertoff*, 509 F.3d 89, 96 (2d Cir. 2007). In *Tabbaa*, defendants argued that the plaintiffs abandoned their demand for expungement by not raising it in their opening brief. *Id.* Rejecting that argument, the Second Circuit panel found that plaintiffs met the

requirements of Rule 28 when they requested that this Court "reverse the District Court ruling granting summary judgment to the defendants." *Id.* "This request incorporates the demand for expungement that plaintiffs made below because a reversal of the grant of summary judgment would necessarily revive that demand. Nothing more is required." *Id.* Similarly, Antonio requested that the Second Circuit "reverse the District Court's dismissal of Antonio's free speech claim," which would necessarily include the available remedies of declaratory relief, injunctive relief and damages sought in the Complaint. Nothing more is required.

The Second Circuit's conclusion that Antonio waived his claim for damages contradicts its own precedent regarding Fed.R. App. P 28 and its own and other circuits' precedent regarding Fed.R.Civ. P. 54(c). It also directly contradicts this Court's holding in *Citizens United* under which Antonio could not have involuntarily waived a remedy while preserving a First Amendment challenge. This Court should grant Antonio's petition to overturn the Second Circuit's improper use of procedural requirements to preclude substantive relief for deprivation of First Amendment rights.

CONCLUSION

The Second Circuit's summary dismissal of Antonio's free speech claim conflicts with this Court's precedents providing that a plaintiff continues to have standing if there is a reasonable expectation that he will again suffer deprivation of

First Amendment rights. The court effectively overruled *Tinker* and other student speech precedent. Finally, the court's conclusion that Antonio somehow waived his right to damages for deprivation of First Amendment rights conflicts with this Court's precedent, Second Circuit precedent, other circuits' precedent and statute.

For these reasons, Antonio respectfully requests that the Court grant his Petition for a Writ of Certiorari.

March 10, 2010.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BREIF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE A REFERENCE TO THAT DATABASE AND THE

DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of October, two thousand and nine,

PRESENT: DENNIS JACOBS,
Chief Judge,

WILFRED FEINBERG,
ROBERT A. KATZMANN,

Circuit Judges.

Antonio Peck, a minor, by and through his parents and next friends, Jo Anne Peck and Kenley Lester Peck,

Plaintiff-Appellant,

v.

08-5666-cv

Filed
October 26, 2009

Baldwinsville Central School District, Catherine McNamara Elementary School, Robert Crème, Individually, and in his official capacity as Principal of Catherine McNamara Elementary School, Theodore Gilkey, individually, and in his official capacity as Superintendent for Baldwinsville Central School District,

Defendants-Appellees.

APPEARING FOR APPELLANT: MATTHEW D. STAVER, Liberty Counsel, Orlando, Florida;
STEPHEN M. CRAMPTON & MARY E. MCALISTER, Liberty Counsel, Lynchburg, Virginia.

APPEARING FOR APPELLEES: LOUIS ORBACH & LILLIAN ABBOTT PFOHL, Bond, Schoeneck & King, PLLC, Syracuse, New York.

Appeal from a judgment of the United States District Court for the Northern District of New York (Mordue, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be VACATED and the matter REMANDED with

instructions to **DISMISS** the complaint for lack of subject-matter jurisdiction.

This lawsuit, filed ten years ago, arises out of a school assignment in which Antonio Peck and the rest of his kindergarten class were required to create posters, for display at an assembly, reflecting what they had learned in class about environmental conservation.

Antonio's first poster consisted of religious imagery, featuring a bearded man in prayer and a sign reading "Prayer Changes Things." Defendants required Antonio to redo his poster because it did not reflect what was taught in class, was (in the defendants' estimation) not his own work, and potentially suggested that the school was teaching religion to kindergarteners.

Antonio's second poster showed, inter alia, two children engaged in recycling; on the lower left-hand corner of the poster was the same image of the bearded man at prayer. When defendants display this second poster at the assembly, the corner was folded over to conceal the picture of the bearded man.

Antonio, by and through his parents, sued under 42 U.S.C. § 1983, arguing that defendants violated the Establishment Clause and his rights to free speech, the free exercise of religion and equal protection when they covered up the religious image on the second poster. Over the course of ten years, various claims and defendants have been

dismissed; all that remains is a free speech claim for declaratory and injunctive relief[1] against the Baldwinsville Central School District and Principal Robert Crème and Superintendent Theodore Gilkey in their official capacities.[2]

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

The Court requested that the parties submit supplemental letter-briefs on the issue of, inter alia, whether Antonio has standing to bring his claim. Having studied those briefs, we conclude that he does not.

Constitutional standing requires that litigants raise an actual case or controversy before availing themselves of the federal courts. See City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983).

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[1] In his original complaint, Antonio also sought damages. In his brief to this Court, however, he asks for declaratory and injunctive relief only. He has therefore waived any claim for damages. See Norton v. Sam's Club, 145 F.3d 114, 117-18 (2d Cir. 1998).

[2] Defendants Crème and Gilkey are no longer employed as principal and superintendent, respectively. Accordingly, pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Principal Mary R. Schilz and Superintendent Jeanne Dangle are automatically substituted as parties in their official capacities.

"Because the standing issue goes to this Court's subject matter jurisdiction, it can be raised sua sponte." Cent. State Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco, 433 F.3d 181, 198 (2d Cir. 2005).

"A plaintiff seeking injunctive of declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) (citing Lyons, 461 U.S. at 105-06); see also Golden v. Zwickler, 394 U.S. 103, 109-10 (1969). To do so, the plaintiff "must demonstrate *both* a likelihood of future harm *and* the existence of an official policy or its equivalent." Shain, 356 F.3d at 216 (emphasis in original); see also Lyons, 461 U.S. at 105-06.

In light of this precedent, we conclude that Antonio lacks standing for declaratory and prospective injunctive relief. See, e.g., Lyons, 461 U.S. at 105-06; Golden, 394 U.S. at 109-10; Shain, 356 F.3d at 216 ; Curtis v. City of New Haven, 726 F.2d 65, 68 (2d Cir. 1984). He points to no policy or custom (or an equivalent) suggesting that any defendant regularly violates students' free speech rights. See Shain, 356 F.3d at 216. Nor has he offered a reason to believe that he faces a "reasonable likelihood" of future harm. Id. at 215.

For these reasons, we hereby **VACATE** the judgment of the district court and **REMAND** with instructions for the district court to **DISMISS** the complaint for lack of subject-matter jurisdiction.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 99-CV-1847

ANTONIO PECK, a minor, by and through his parents and next friends, JO ANNE PECK and KENLEY LESTER PECK, Plaintiff,

v.

BALDWINSVILLE CENTRAL SCHOOL DISTRICT,CATHERINE MCNAMARA ELEMENTARY SCHOOL, ROBERT CREME, individually and in his official capacity as Principal of Catherine McNamara Elementary School, and THEODORE GILKEY, individually and in his official capacity as Superintendent for Baldwinsville Central School District, Defendants.

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Norman A. Mordue, Chief U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. BACKGROUND

Jo Anne Peck and Kenley Lester Peck brought this action on behalf of Antonio Peck ("Antonio"), a kindergarten student at the time of the events in question, against Baldwinsville Central School District ("District"), Catherine McNamara Elementary School ("School"), the School's Principal Robert Creme and the District's Superintendent Theodore Gilkey (collectively "defendants"). In the complaint, Antonio challenges defendants' conduct with respect to two posters he prepared in response to an assignment. Defendants rejected the first poster, which contained religious images, and displayed the second poster with a portion folded under so as to conceal a religious image. Antonio claims that defendants' actions infringed his First Amendment right to freedom of speech and religion, denied him equal protection of the law, and violated the Establishment Clause.

Defendants moved to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). By Memorandum Decision and Order dated February 15, 2000, this Court converted

defendants' Rule 12(b)(6) motion into a Rule 56(b) motion, and granted summary judgment on all counts in favor of defendants. *See Peck v. Baldwinsville Cent. School Dist.*, 2000 U.S. Dist. LEXIS 13362 (N.D.N.Y. 2000). Plaintiff appealed the decision and on March 28, 2001, the Second Circuit vacated the judgment and remanded the case for discovery. *Peck v. Baldwinsville Cent. School Dist.*, 7 Fed.Appx. 74, 75-76, 2001 WL 303755, *2 (2d Cir. 2001). After plaintiff concluded discovery defendants moved for summary judgment. By Memorandum Decision and Order dated August 16, 2004, this Court granted defendants' motion and dismissed the action in its entirety. Dkt. No.77.

Plaintiff appealed the decision and on October 18, 2005, the Second Circuit affirmed the Court's dismissal of plaintiff's Establishment Clause claim but vacated and remanded plaintiff's free speech claim. *Peck v. Baldwinsville Cent. School Dist.*, 426 F.3d 617 (2d Cir. 2005). On January 29, 2007, the Court held a bench trial to resolve the following questions:

> 1. Did plaintiff prove by a preponderance of the evidence that the direct cause of the decision to display plaintiff's second poster with the image of Jesus folded under was
>
> (a) an official policy of the Board of Education, or
>
> (b) a school district custom so

permanent, widespread and well-settled as to constitute the equivalent of an official policy of the Board of Education of the Baldwinsville Central School District?

2. Did plaintiff prove by a preponderance of the evidence that Antonio's poster conveyed a religious viewpoint on the topic of how to save the environment?

3. Did plaintiff prove by a preponderance of the evidence that the poster would not have been similarly treated if it had depicted a purely secular image that was equally outside the scope of Ms. Weichert's environmental lessons and non-responsive to the assignment?

Following the one-day bench trial, the parties submitted proposed findings of fact and conclusions of law. Dkt. Nos. 124, 125. The following constitutes the Court's findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52.

II. FINDINGS OF FACT

At trial, Mrs. Peck, Mrs. Weichert, and Principal Creme testified. Superintendent Gilkey, was not available for trial; accordingly the parties introduced portions of his deposition testimony.[3]

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[3] Defendants object to the introduction of certain

Antonio was a kindergarten student during the 1999-2000 school year at Catherine McNamara Elementary School in the Baldwinsville Central School District. Dkt. No. 104, p.2. Beginning in September and continuing until June, Dkt. No. 120, Bench Trial Transcript, p.48 ("T.48"), Antonio's teacher, Susan Weichert, taught an environmental curriculum which addressed ways to take care of the earth, and how the students could find ways to help the earth. T.98. Mrs. Weichert explained that they "had a big push about turning off the lights when we left the classroom to save energy, turning off the water to save the water, help take care of our environment by picking up the trash". T.45. Recycling at home and in school was also part of the environmental curriculum. T.98-99. At the end of the school year, the School held a kindergarten environmental program, during which the kindergarten students would sing environmental songs and the environmental posters they prepared

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portions of Superintendent Gilkey's deposition testimony. The Court has considered those objections and sets forth the designated portions of his testimony which it finds relevant to the disposition of this case. To the extent defendants object based on form, without further explanation, those objections are overruled. Defendants' objections to the designations of Superintendent Gilkey's answers, without also incorporating the preceding questions are sustained, and the Court incorporates the preceding questions.

would be displayed. T.41. The kindergarten teachers assigned the students to do posters for the environmental program in order to assess the students and obtain "an overview of what the child had learned throughout the year on ways that he [or she] could care for the earth". T.99. The posters were "mainly for the parents to look at and for the children to have an opportunity to show their understanding of ways that they can help the earth." T.82. Mrs. Weichert instructed the children that the poster should show what they learned in class. T.100. Mrs. Weichert also sent a letter addressed to parents explaining, in relevant part:

> We are writing to inform you about our environmental program that we will be presenting to the parents on June 11th.... Please try to attend, the children are very excited about this program and will spend a lot of time preparing for it. In previous years, as part of our environmental program and as a culminating activity, we will plant a tree on the school grounds. To raise funds to purchase this tree, we have asked the children to bring in returnable cans. We will start collecting cans immediately. We appreciate your involvement in this project.
>
> To enhance the student's understanding of his environment, we are asking students to make an environmental poster at home and

> bring it to school by June 4th. These posters will be on display at our program. The children may use pictures or words, drawn or cut out of magazines or computer drawn by the children depicting ways to save our environment, i.e. pictures of the earth, water, recycling, trash, trees etc. This should be done by the student with your assistance. The poster should be able to fit in the child's backpack. We hope this project will be fun for all!

Plaintiff's Ex. 1. Mrs. Weichert sent home a second letter to parents announcing a time change in the environmental program, it also reminded parents "that each student should be working on his environmental poster to be hung up at the Program. Ideas should involve ways to save Earth and it should be the child's work. Pictures drawn, cut out of magazines, or computer drawn are all great ideas." Plaintiff's Ex. 2; T. 44.

A. First Poster[4]

Antonio brought both these letters home in his backpack and Mrs. Peck read them. T.15. She understood that "Antonio was to do a poster on how to save the environment. It had to be the child's

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[4] Plaintiff does not, at this point, raise any claims with respect to the first poster.

original ideas. There could be help from the parents, but that they wanted it mainly the child's idea." *Id.* Mrs. Peck sat down with Antonio and "got out books . . . magazines and stuff for Antonio to do, and he cut out stuff from magazines and he did a poster." *Id.* According to Mrs. Peck, Antonio selected the pictures cut them out, and put them on the poster himself. T.16. Antonio also conveyed to Mrs. Peck that "he wanted it to say, the only way to save our world" which Mrs. Peck wrote down on a piece of paper, and Antonio signed his name on the bottom. *Id.* Mrs. Peck believed the poster was intended to convey "environmental, how to save the earth, recycling stuff and just what they had been learning. And that's what Antonio said, that the only way to save the earth was through Jesus, and he picked the picture and put them on" the first poster. T.17.

Across the top of the first poster were the words "the only way to save our world!" Plaintiff's Ex. 3. The poster contained cut-out pictures which had been attached to the paper. *Id.* The pictures included: a bearded man kneeling with clasped hands and eyes closed in prayer; a picture of a soldier with the words "The Armor of God"; a picture of a woman carrying fruit with the words "The Fruit of the Spirit"; a picture of a bearded man carrying two stone tablets with the words "The Ten Commandments"; a picture entitled "My God's World", with pictures of a girl, house, Bible, Jesus, family, church, God and heaven; a picture of Jesus walking with a little boy with the words "Jesus Loves the Children"; a picture of a choir

singing with the words "Jesus loves me this I know, for the Bible tells me so . . ."; a picture of the sun on the horizon with the words "In the beginning God created the heavens and the earth; a picture of a scroll with the Ten Commandments; a picture of a boy and a girl; a picture of a rainbow with the words "God keeps his promises"; and pieces of paper with the words "Prayer Changes Things" and "God's love is higher than the heavens". *Id.* The poster also had a large picture of Jesus, kneeling with arms raised next to the words "Seek to Find Jesus". *Id.* When Mrs. Weichert received Antonio's first poster, she "looked at it and thought I've been teaching environmental conservation . . . from September, and this poster doesn't talk about anything that I've been teaching for the last almost ten months." T.48. Mrs. Weichert took the poster to Principal Creme, "to ask his advice on what I should do with this poster." *Id.* She was "concerned that it didn't have anything to do with what I had been teaching since September." T.49. Mrs. Weichert explained that "[i]t was clearly a religious poster with religious overtones. I hadn't taught any of those things, so I felt that I needed a poster from Antonio that reflected what he had been learning in kindergarten." T.50.

Principal Creme discussed the first poster with Mrs. Weichert and was concerned because he "didn't think that it was something that Antonio had been truly responsible for." T.107. Principal Creme explained that he "had known of Antonio's progress and capabilities throughout the school

year. I also knew what the unit of instruction was that had taken place, and I didn't see any way for Antonio to make the leap from that unit of instruction to this topic." T.108. Principal Creme telephoned Baldwinsville Central School District Superintendent Theodore Gilkey to ask if the poster "should be handled in the same way as things that were submitted that were obviously not the work of the student that supposedly submitted them." *Id.* Superintendent Gilkey said yes. T.109.

Superintendent Gilkey stated that the practice of the District when there is "a situation where a teacher has a concern with any activity in the classroom . . . they bring it to the attention of the building principal." Gilkey Deposition Transcript, p.14. At that point, the building principal "has to make a decision. And if the building principal doesn't feel that he or she can make the appropriate decision, then they would contact either . . . myself or the assistant superintendent." Dep., p.16. Superintendent Gilkey stated that he received a call from Principal Creme at some point, he assumed, after Antonio turned in his first poster. Dep., p.37. Superintendent Gilkey told Principal Creme that he had no problem with asking Antonio to redo the poster because it did not "reflect the assignment that was given", *id.*, or the "instruction that took place in the class". Dep., p.38.

Mrs. Peck testified that Mrs. Weichert informed her that Antonio had to do another poster

"because of its religious content and she thought that she would get in trouble if she hung this poster." T.17. Mrs. Peck stated that she then spoke with Principal Creme who told her that the poster had too much religious stuff in it. Had it showed what he had learned through recycling, different environmental things, you know, kids throwing things in trash and stuff, that he would allow some of the religion, just that it needed to show what he had learned and so we did complete a second poster.T.18. Mrs. Peck testified that Principal Creme told her that the second poster could have "a little bit of religious stuff, but more like kids throwing things in trash, kids circling the world . . . environmental stuff for . . . what they had learned over the past six weeks." *Id.*

B. Second Poster

According to Mrs. Peck, Antonio completed a second poster by taking some "coloring pages out of magazines", using some recycling pictures from the computer, and incorporating a picture of Jesus and his original idea that "Jesus saved the earth and that he had something to do with the environmental part of the poster." T.19, 20-21. Antonio completed the second poster himself, and wrote his name on it. T.21. In the center of the second poster is a church with three crosses on it as well as a picture, in one of the windows, of a boat - an ark. Plaintiff's Ex. 4. There is a tree on each side of the church and four mice around the church and the trees. *Id.* There are two children in front of the church throwing garbage into two trash cans. *Id.*

There are pictures of clouds in the sky. *Id.* In the upper right of the poster, there is a picture of a globe with children holding hands around it. *Id.* In the lower right, there is a picture of two people recycling. *Id.* On the left, is the same large picture of Jesus kneeling with hands lifted upwards as was on the first poster. *Id.* Mrs. Weichert explained that before the posters were hung in the cafeteria for the program, "each child got an opportunity to explain to the class ways that they were going to helpthe earth." T.51. When Mrs. Weichert asked Antonio to explain his poster, he "talked about the little children throwing trash in the bucket". T.66-67. Antonio did not specifically talk about the kneeling figure, so Mrs. Weichert "asked him just like I would anybody else if there were a portion that they didn't speak to, Antonio, there is another picture on this poster, would you like to talk about it, and Antonio didn't have anything to say about the other picture." T.66.

According to Mrs. Weichert, the pictures on Antonio's second poster of people recycling, the children circling the globe, children picking up trash and putting it in the garbage, and the trees were all consistent with her class instruction. T.51-52. Mrs. Weichert, however went back to Principal Creme because although she "felt that three-quarters of the poster did depict ideas that had been taught in class since September . . . the kneeling figure . . . wasn't relevant to what had taught in kindergarten" because she did not "teach religion in kindergarten." T.53. Mrs. Weichert testified that the kneeling figure was "clearly

religious." T.54. Mrs. Weichert and Principal Creme "agreed that the poster should be hung, and we agreed that the portion we could just fold under because it didn't have anything to do with what . . . I had taught." *Id.*[5] In doing so, it was Mrs. Weichert's "intent to show the portion of the poster that, in fact, dealt with what I had been teaching since September." *Id.* Mrs. Weichert further explained that she also folded the picture of Jesus because she "felt that other parents could look at this poster and think, and make the leap that I was, in fact teaching religion in the classroom, which I was not." T.60. Principal Creme testified that the second poster was folded "because it contained a part of the first poster which was not the student's work." T.173. There were approximately 80 posters displayed during the environmental program. T.25.

On June 11, 1999, when Mrs. Peck arrived at the environmental show she saw that Antonio's poster was displayed, but had been folded in half [6] "so that you couldn't see the side where Jesus was". T.21, T.24. When she got home from the program, Mrs. Peck called Principal Creme and asked why

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[5] Principal Creme did not recall seeing Antonio's poster prior to the program. T.114. 9

[6] Mrs. Weichert and Principal Crème intended that the poster be folded to conceal the image of Jesus only. There is no evidence that the folding of the poster in half was anything but inadvertent.

Antonio's poster was folded. T.26. Mrs. Peck stated that Principal Creme told her it was folded "for the same reasons that he had told me with the other one, that the religious content." T.27. Subsequently, Mrs. Peck spoke with Superintendent Gilkey to ask whether there were "any written policies on children's art work with religious aspect in schools." *Id.* Superintendent Gilkey responded that there was not but it was up to the individual school principal. *Id.*

Superintendent Gilkey testified that it was his understanding that the second poster was folded in half was because: Mr. Creme or Mrs. Weichert had a concern, number one, that the poster was not responsive to the assignment, a portion of the poster was not responsive to the assignment. And secondly, they were concerned that by displaying the poster they would communicate to the people at the activity that the school was endorsing religion, or Jesus. Dep., p.44. Although Superintendent Gilkey learned of the decision afterward, Dep., p.45, and did not attend the environmental program, Dep., p.47, he approved of the decision to fold the poster in half. Dep., p.44.

Superintendent Gilkey had a conversation with Mrs. Peck, at some point, about whether the District had a policy regarding the display of posters. Dep., p.73. Superintendent Gilkey told her that it did not. *Id.* Superintendent Gilkey also discussed this case with the Board of Education sometime after he "became aware of the concerns"

that arose from the program. Dep., [4]Mrs. Weichert and Principal Creme intended that the poster be folded to conceal the image of Jesus, only. There is no evidence that the folding of the poster in half was anything but inadvertent. p.90. He informed them that there were "concerns" and that there might be "some legal action." Dep., p.91. Superintendent Gilkey explained to the Board that he had spoken with Principal Creme and learned that "a portion of the poster had been folded over . . . so that the figure of Jesus was not displayed. And that the reason he did that was that it was not responsive to the assignment and that he thought it could be interpreted as the school supporting or endorsing religion." *Id.*

C. Motivations for Censoring the Second Poster

At this stage, the relevant inquiry centers on whether defendants censored Antonio's poster because it was non-responsive, or because it offered a religious perspective on the topic of how to save the environment. Accordingly, at trial, plaintiff's counsel extensively questioned Mrs. Weichert and Principal Creme regarding their motivations for folding over the image of Jesus on Antonio's poster. Mrs. Weichert testified that she folded the image of Jesus over on Antonio's poster because: (1) "it didn't have anything to do with what [she] had been teaching since September"; T.60, (2) Antonio did not explain it; T.84, (3) she did not believe Antonio could explain the relationship between the image of Jesus and saving the environment; T.88, and (4)

she "felt that other parents could look at this poster and . . . make the leap that I was, in fact teaching religion in the classroom, which I was not." T.60. Principal Creme testified that because the first and second posters both contained the same image of Jesus, and since he did not think the first poster was Antonio's work, he did not think that the image of Jesus on the second poster was Antonio's work, either. T.118. Principal Creme explained that the "level of thinking that would be required to . . ." "move from concrete examples of ways to preserve the environment to something that is . . . very abstract" and would have been "beyond Antonio's ability at the time" T.123. Principal Creme testified that looking at the second poster "now" he would also "believe that some people would have felt that we were teaching religion" if the Jesus image had been displayed. T.130.

At trial, plaintiff's counsel asked Mrs. Weichert questions regarding her hypothetical response to posters that, instead of an image of Jesus, contained a manatee, the Sierra Club logo, atoms, or Smokey the Bear, images which, like Jesus, she did not specifically discuss in class. Mrs. Weichert stated that had a student put a manatee on his or her poster, she would have "seen and listened to what he had to say when he explained the poster to the class. I wouldn't have done it on an individual basis or apart from the class, he would have done it in front of the class." T. 57. Mrs. Weichert testified at trial that she did not know whether she would have allowed the poster to be displayed if the student did not explain the

manatee, *id.*, but acknowledged that during her deposition she stated that she "probably wouldn't have folded it over because I can't imagine that there would have been any parent that would have objected to a manatee because they wouldn't have construed it as anything other than an animal." T.59. Mrs. Weichert testified at trial that although they did not discuss endangered species in class, they did talk "about animals and why we were taking care of the earth, to help the people as well as the animals." T.56.

When asked what she would do if a student put the Sierra Club logo on his or her poster, Mrs. Weichert responded: I guess my best answer to that would be that the Sierra Club has to do with environmental. Do I think the child would understand or would have come up with that on his own? No. I think that would have been something that would have come straight from the parents. Because it still had an environmental theme, probably would have allowed it. Again, I would wait to see what the student had to say when he presented it to the class. T.61.

Principal Creme was also asked about the presence of a Sierra Club logo instead of the image of Jesus, and whether that would have been permitted if the student explained it. T.130.

Principal Creme responded:

> No. I think I would have believed that that's something that somebody other than a child did come up with.

> We're talking about kindergarten students. Sierra logo in connection with what was taught in this unit would not have been something that would have come across the mind of a child that age.

T.130. Principal Creme further stated that he would leave the determination of whether a student could explain the relationship between the Sierra Club and the environment to the kindergarten teacher. T.134.

Next, plaintiff's counsel asked Mrs. Weichert how she would respond if a student put some pictures of atoms instead of Jesus on his poster. T.63. Mrs. Weichert could not imagine how a five-year-old could come up with atoms, but stated that "[i]f the student could explain it to me and it was related to the environment and he could relate how those atoms were going to help the earth and help him take care of the earth, then I would have allowed it." *Id.* Mrs. Weichert further explained that if the student's explanation "had been responsive to what I had taught, not the atoms per se, but if he could explain to me how that related to what he had been learning since September, then yes, I would have accepted it." T.64.

Finally, plaintiff's counsel asked Mrs. Weichert how she would approach the situation if there were a picture of Smokey the Bear, instead of Jesus, on Antonio's poster. *Id.* Mrs. Weichert

responded, that she: would approach in the same way I had approached all the posters; the child would have an opportunity to explain it to the class and I would listen to hear what the child had to say. If he could relate why Smokey the Bear was there in relation to what he had learned in the classroom since September, then I would have accepted it. T.65.

After discussing these images with Mrs. Weichert, plaintiff's counsel asked how she would have responded if Antonio:

> told you that this picture of Jesus was his way of expressing how to save the world and that Jesus was important to saving the world, even though he gave you that explanation, you would not post it because of the concern of people thinking that you were teaching religion?

T.88 Mrs. Weichert testified that: The whole idea of the children making these posters was to show me what they had learned from September through June on ways that they could help the environment. I guess I'm a little vague on how he could have possibly explained how he felt that he directly could take care of the earth -- I don't know. It's difficult to answer this question without knowing, without speculating on what Antonio would say about this figure. *Id.*

Principal Creme testified that with regard to

the picture of Jesus on Antonio's poster, it was his "assumption . . . that what's there was not Antonio's thought process and not his · · he didn't relate that to the assignment that was given, not on his own." T.122. Principal Creme explained that "the level of thinking that would be required to make that leap was something that was beyond Antonio's ability at that time." T.123. More specifically, "he is moving from concrete examples of ways to preserve the environment to something that is not at all concrete, is very abstract." *Id.* Finally, Principal Creme testified that he could not say whether, if Antonio had explained why the image of Jesus was on his poster, it would have been displayed because "[i]t's not something that Antonio would have been capable of doing at this time him his life." T.174.

III. PROCEEDINGS BEFORE THE SECOND CIRCUIT

As stated, after the Court granted summary judgment for defendants in this case, plaintiff appealed to the Second Circuit. The Second Circuit reversed the Court's entry of summary judgment on plaintiff's free speech claim and remanded it for further proceedings. In doing so, the Second Circuit first considered "what sort of forum had been created for the environmental poster assignment" since, it explained, "the level of judicial scrutiny that must be applied to state actions inhibiting speech varies with the nature of the forum in which the speech occurs." *Peck,* 426 F.3d at 626. The Second Circuit found the undisputed facts in this

case showed that the School facilities, including Antonio's classroom and the School cafeteria, were a non-public forum. *See Peck*, 426 F.3d at 626-27. A non-public forum is "neither traditionally open to public expression nor designated for such expression by the State." *Id.* At 626. In such a forum, the government may exclude a speaker "if he wishes to address a topic not encompassed within the purpose of theforum, or if he is not a member of the class of speakers for whose especial benefit the forum was created". *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985) (internal citation omitted). However, the government violates the First Amendment when it excludes a speaker "solely to suppress the point of view he espouses on an otherwise includible subject." *Id.*

The Second Circuit next addressed the "nature of-and level of constitutional protection to be accorded to-the student expression represented by Antonio's poster", *Peck*, 426 F.3d at 627. In this regard, the Second Circuit concluded that Antonio's poster was school-sponsored speech and fell within the framework of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988). *Id.* at 628. In *Hazelwood*, the Supreme Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273.

Here, the Second Circuit found that because the undisputed facts showed that in addition to being displayed at a school-sponsored assembly, "the poster was prepared by Antonio pursuant to a class assignment, and one that was given under highly specific parameters: to 'depict[ ] ways to save our environment' and to reflect what had been taught in the kindergarten environment unit" *Peck*, 426 F.3d at 628, the poster was school-sponsored speech. *Id.* at 629 (the poster and environmental assembly "were indisputably 'part of the school curriculum . . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.'") (quoting *Hazelwood*, 484 U.S. at 271).

The Second Circuit then turned to the question of "whether the record demonstrates triable issues as to whether The District's reasons for censoring Antonio's poster are, in the language of *Hazelwood*, 'reasonably related to legitimate pedagogical concerns.'" *Id.* On appeal, the parties agreed that the "pedagogical concerns" that motivated the District to censor Antonio's poster were: a) that the portion of Antonio's poster depicting the robed figure was not responsive to the assignment; b) that the placement of that image on the poster was not Antonio's own work; and c) that showing the image risked creating the impression that the kindergarten environmental unit had included the teaching of religion. *Peck*, 426 F.3d at 629-630. The Second Circuit noted that "[u]nquestionably" these pedagogical concerns pertained to legitimate interests. *Id.* at 630, n.8.

More specifically, the Second Circuit found that the undisputed facts showed that Mrs. Weichert and Principal Creme "made a reasonable determination that JoAnne Peck (and not Antonio) was responsible for the poster's content," and thus that the second "pedagogical concern" did not implicate the First Amendment. *Id.* at 630. The Second Circuit then addressed this Court's conclusion that "there were no triable issues as to whether The District had engaged in viewpoint discrimination . . . because . . . the robed figure shown on Antonio's poster was unquestionably beyond the scope of the poster assignment". *Id.* On this score, the Second Circuit found that there were fact questions which raised an issue as to the "viewpoint neutrality of The District's decision with respect to Antonio's poster." *Id.* The Second Circuit explained that:

> In our judgment, however, the district court overlooked evidence that, if construed in the light most favorable to the Pecks, suggested that Antonio's poster was censored *not* because it was unresponsive to the assignment, and not because Weichert and Creme believed that JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment.

Id. at 630. Specifically, while recognizing the

difficulty of drawing a line between content discrimination and viewpoint discrimination, the Second Circuit found disputed factual questions "as to whether Antonio's poster offered a 'religious viewpoint' and whether, if the poster had depicted a purely secular image that was equally outside the scope of Weichert's environmental lessons, it would similarly have been censored." *Id.* at 631. The Second Circuit cited evidence that had Antonio placed a manatee, the Sierra Club logo, and atoms, "all of which would have been non-responsive to the assignment to the extent that such topics were not specifically covered in class", Mrs. Weichert would not have folded over those images because no one "would surmise that [Weichert] may have been teaching religion in kindergarten." *Id.* Additionally, the Second Circuit, explained, there was evidence that had one of those images been on a student's poster, Weichert would have "asked the relevance of the picture to what he had learned in class" but that "Antonio was never asked directly whether the robed figure bore any connection to the environment." *Id.* The Second Circuit found that one "possible interpretation" was that Mrs. Weichert and Principal Creme "viewed the Jesus image as being so wholly outside the scope of the curriculum that further inquiry was unnecessary before censoring the image, and that they would have also censored a secular image that was equally non-responsive." *Id.* Viewing the facts in the light most favorable to plaintiff, however, the Second Circuit held that it was also possible to infer that Weichert and Creme "were particularly

disposed to censor Antonio's poster because of its religious imagery and that they would not necessarily have similarly censored secular images that were equally non-responsive." *Id.* If plaintiff proved these facts, the Second Circuit concluded, defendants' actions "might well amount to viewpoint discrimination." *Id.*

IV. CONCLUSIONS OF LAW

In accordance with the Second Circuit's decision in this matter, at trial, the Court and the parties proceeded on the premises that: (1) the School facilities were a non-public forum and that, accordingly, defendants were entitled to censor Antonio's poster in a reasonable and viewpoint-neutral manner, *Make the Rd. By Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004); and (2) the poster and the environmental program were school-sponsored and that the "*Hazelwood* 'reasonable relation to legitimate pedagogical concerns' test provides the appropriate lens through which to examine The District's censorship of Antonio's poster." *Peck*, 426 F.3d at 629. Further, based on the Second Circuit's decision in this case, the parties agree that the questions the Court must resolve following the bench trial are:

Did plaintiff prove by a preponderance of the evidence that Antonio's poster conveyed a religious viewpoint on the topic of how to save the environment?

Did plaintiff prove by a preponderance of the evidence that the poster would not have been

similarly treated if it had depicted a purely secular image that was equally outside the scope of Ms. Weichert's environmental lessons and non-responsive to the assignment?

Did plaintiff prove by a preponderance of the evidence that the direct cause of the decision to display plaintiff's second poster with the image of Jesus folded under was (a) an official policy of the Board of Education, or (b) a school district custom so permanent, widespread and well-settled as to constitute the equivalent of an official policy of the Board of Education of the Baldwinsville Central School District?

A. Viewpoint Discrimination

Viewpoint discrimination is a "subset or particular instance of the more general phenomenon of content discrimination," *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 831 (1995), in which "the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* at 829. "[S]peech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); *accord Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

Assuming that Antonio's poster conveyed a religious viewpoint on the topic of how to save the

environment, the Court concludes that plaintiff failed to prove by a preponderance of the evidence that defendants would have treated another poster with an equally non-responsive secular image, differently. As an initial matter, none of the images plaintiff relied on at trial are "equally non-responsive". Mrs. Weichert testified that she would permit an image that was not addressed in the environmental lessons if the student could explain how the image "related" to the environmental lessons, an opportunity she extended to every student, including Antonio. Each of the "secular images" plaintiff relied on directly "related" to the environment: the Sierra Club, as Mrs. Weichert pointed out, "has to do with environmental", T.61; atoms and a manatee are part of the physical environment; and Smokey the Bear represents a campaign to prevent forest fires. The connection between the image of Jesus and the environmental lessons Mrs. Weichert taught, in contrast, and as Principal Creme testified, was "abstract," and required a "leap". T.123. Thus, none of the "secular images" are "equally non-responsive". The Court nonetheless considers whether Mrs. Weichert's and Principal Creme's responses to questions about these images offer insight into defendants' motivations for censoring Antonio's poster, and, more specifically, whether they show that defendants engaged in viewpoint discrimination.

At trial, plaintiff's counsel asked Mrs. Weichert and Principal Creme how they would have responded if, instead of an image of Jesus, a student had placed an image of a manatee, the

Sierra Club logo, atoms, or Smokey the Bear on his poster. Mrs. Weichert responded that she would have allowed those images to be displayed if the student explained their relation to, or how they were consistent with, the environmental lessons. Although Mrs. Weichert stated during her deposition that she "probably" would have allowed an image of a manatee even if the student did not explain it, she further explained at trial that, unlike religion, which she did not talk about, she did talk about animals in class and "why we were taking care of the earth, to help the people as well as the animals."[7] T.56. Therefore, any comparison between Mrs. Weichert's responses to the presence of an image of a manatee and the image of Jesus, is inapposite.

In this case, it is undisputed that Antonio did not explain the image of Jesus on his poster, despite receiving the same opportunity any other student with a non-responsive image on his poster would have received. When Mrs. Weichert asked Antonio to explain his poster, he "talked about the little children throwing trash in the bucket". T.66-67. Antonio did not specifically talk about the kneeling figure, so Mrs. Weichert "asked him just like I would anybody else if there were a portion that they didn't speak to, Antonio, there is another picture on this poster, would you like to talk about

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[7] Indeed, Antonio's poster as displayed contained pictures of four mice. There is no evidence that Antonio explained why they were there.

it, and Antonio didn't have anything to say about the other picture." T.66.

There is no evidence that Mrs. Weichert would have allowed the image of the Sierra Club logo, atoms, or Smokey the Bear without first receiving an explanation from the student about how that image related to the environmental lessons. Thus, neither Mrs. Weichert's nor Principal Creme's responses to these questions reveal unconstitutional motivation since, unlike the hypotheticals which assumed the student explained how the image related to the environment, Antonio gave no explanation, even when prompted.

Plaintiff argues that it is of no consequence that Antonio did not explain how the image of Jesus related to the environment because defendants would have censored Antonio's poster on the basis that it was religious, regardless of his explanation. In support of this argument, plaintiff points that although Mrs. Weichert testified that she would allow images of the Sierra Club logo, atoms, or Smokey the Bear to be displayed if the student had explained how the image was relevant to the environmental lesson, neither she nor Principal Creme could say whether they would have allowed the image of Jesus to be displayed if Antonio had related the image to the environmental lessons. This, plaintiff argues, is evidence of viewpoint discrimination because it shows that defendants treated the image of Jesus differently because it was religious.

Mrs. Weichert testified that she could not answer the question of whether she would have allowed the image of Jesus to be displayed if Antonio had explained how the image related to the environmental lessons because: (1) Antonio offered no explanation; (2) she would "have to hear what Antonio had to say on the subject of why the kneeling figure was there" before she could answer that question; and (3) she was "vague on how he could have possibly explained how he felt that he directly could take care of the earth - - I don't know." T.87-88. Principal Creme unequivocally testified that in his opinion, Antonio lacked the capacity to appreciate or explain the relationship between the image of Jesus and the environment and thus could not answer the question. None of these reasons depend upon religion; they center on the fact that Antonio did not explain the image of Jesus, the abstractness of the relationship between religion and the environmental lessons, and Antonio's inability to appreciate or explain such a relationship. Therefore, Mrs. Weichert's and Principal Creme's inability to say whether they would have accepted Antonio's poster with the image of Jesus if he had offered an explanation, is not evidence of viewpoint discrimination.

Unquestionably, the religious nature of the image of Jesus on Antonio's poster was of concern to both Mrs. Weichert and Principal Creme. They repeatedly testified that they believed that parents at the environmental program who saw Antonio's poster might think that Mrs. Weichert was "teaching in the classroom that Jesus would be a

way to save the earth or help the earth." T.82. While this concern obviously centers on the religious nature of the image of Jesus, it is not evidence of viewpoint discrimination. As the Second Circuit stated in its discussion of plaintiff's Establishment Clause claim, "[w]hile the . . . avoidance of the perception of religious endorsement, is no doubt involved with religion, such a goal does not bespeak an intent to inhibit religion itself." *Peck*, 426 F.3d at 634. Indeed, as educators, Mrs. Weichert and Principal Creme, are obligated to "assure that participants learn whatever lessons the activity is designed to teach that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271. Thus, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Further, Mrs. Weichert's and Principal Creme's legitimate pedagogical concern that parents might think, based on Antonio's poster, that Mrs. Weichert was teaching religion, was reasonable given the purpose and parameters of the assignment. The poster assignment was designed to "enhance the student's understanding of his environment" and to enable the teacher to assess what the child had learned from the

environmental lessons. Plaintiffs Ex. 1. Further, the assignment was limited to depicting "ways to save our environment, i.e. pictures of the earth, water, recycling, trash, trees, etc." *Id.* Mrs. Weichert instructed her students that the poster should show what they had learned in class. T.100. Mrs. Weichert testified that an image would be acceptable so long as the student could "relate" it to the environmental lessons. Since the intent of the poster assignment was to prompt the student to demonstrate what he had learned from the environmental lesson, it was reasonable for the educators in this case to be concerned that a parent viewing Antonio's poster might think he had learned about Jesus in class. Although as Principal Creme testified, there were steps they could have taken to minimize this possibility other than censoring Antonio's poster, "[t]he *Hazelwood* standard does not require that the guidelines be the most reasonable or the only reasonable limitations, only that they be reasonable." *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 932 (10th Cir. 2002) (internal quotation marks omitted, alteration omitted).

Thus, based on the above, the Court finds that plaintiff failed to prove by a preponderance of the evidence that the poster would not have been similarly treated if it had depicted a purely secular image that was equally outside the scope of Mrs. Weichert's environmental lessons and non-responsive to the assignment. Accordingly, in the absence of viewpoint discrimination, plaintiff's free speech claim is dismissed.

B. *Monell*

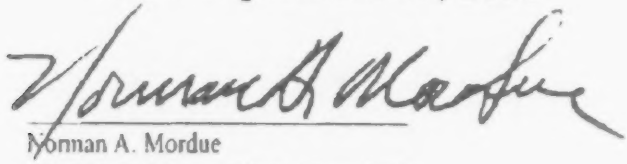
Plaintiff continues to argue that defendants have waived the *Monell* issue because they did not address it prior to trial. The Court reaffirms its prior holding that: [t]here is no merit to plaintiff's argument that defendants waived this issue or should have raised it as an affirmative defense. The matters raised in the January 22, 2007 letter do not excuse plaintiff from his burden at trial to establish that the alleged deprivation in issue resulted from an official policy or custom. Plaintiff's motion (Dkt. No. 107) is denied Dkt. No. 110, Memorandum-Decision and Order - Pretrial Issues, pp. January 24, 2007. Further, in the absence of any unconstitutional conduct, even assuming plaintiff established by a preponderance of the evidence that the conduct at issue executed an official school district policy or was conducted pursuant to school district custom so permanent, widespread and well-settled as to constitute the equivalent of an official policy of the Board of Education, *see Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978), they would not be entitled to relief.

V. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that judgment is entered for defendants; and it is further ORDERED that the complaint is dismissed; and it is further ORDERED that the Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Date: September 30, 2008



Norman A. Mordue
Chief United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of December, two thousand and nine,

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Antonio Peck, a minor, by and through his parents and next friends, Jo Anne Peck and Kenley Lester Peck,

Plaintiff-Appellant,

v.

Baldwinsville Central School District, Catherine McNamara Elementary School, Robert Crème, Individually, and in his official capacity as Principal of Catherine McNamara Elementary School, Theodore Gilkey, individually, and in his official capacity as Superintendent for Baldwinsville Central School District,

Defendants-Appellees.

ORDER

Docket Number: 08-5666-CV

Filed December 11, 2009

Appellant Antonio Peck filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: Richard Alcantara, Deputy Clerk

		Judgment be taken on submit (kcl) (Entered: 10/17/2002)
10/16/2002	74	LETTER/ORDER dated 10/15/02, Letter advising counsel for parties that the Defendants Motion for Summary Judgment returnable 11/6/02 has been taken on submit (s.gned by Judge Norman A. Mordue 10/15/02) (kcl) (Entered: 10/17/2002)
02/20/2003	75	NOTICE of Supplemental Authority by Matthew Staver, Esq. for plif Antonio Peck (kcl) (Entered: 02/20/2003)
03/12/2003	76	LETTER/NOTICE dated 3/12/03; Letter addressed to Judge Mordue from Louis Orbach, Esq., counsel for defts ; Letter is in response to pltfs "Notice of Supplemental Authority" filed on 2/13/03. Counsel further supports defts. motion for Summary Judgment (kcl) Additional attachment(s) added on 9/13/2004 (jmb,) (Entered: 03/12/2003)
08/16/2004	77	MEMORANDUM DECISION & ORDER: granting defendants' 65 Motion for Summary Judgment, the action is therefore dismissed in its entirety. Signed by Judge Norman A Mordue on 8/16/04. (jmb) (Entered: 08/17/2004)
08/17/2004	78	JUDGMENT : in favor of defendants' against plaintiffs' (Issued by Deputy Clerk: Joanne Bleskoski) (jmb) (Entered: 08/17/2004)
09/08/2004	79	NOTICE OF APPEAL as to 77 Order on Motion for Summary Judgment, 78 Judgment by Antonio Peck. (Stanley, Erik) (Entered: 09/08/2004)
09/09/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals, with Cover Memo. Re: 79 Notice of Appeal. (jmb) (Entered: 09/09/2004)
09/13/2004	80	USCA Appeal Fees received $ 255, Receipt number: SYR # 115, Re: 79 Notice of Appeal filed by Antonio Peck. (jmb) (Entered: 09/17/2004)
09/21/2004	81	Return Receipt of Appeal Cover Memo : Re: 79 Notice of Appeal. (jmb) (Entered: 09/23/2004)
10/06/2004		USCA Case Number is 04-4950-cv for 79 Notice of Appeal filed by Antonio Peck. (cbm,) (Entered: 10/06/2004)
10/18/2004	82	NOTICE OF WITHDRAWL OF ASSOCIATED COUNSEL: as to Antonio Peck, Joel I. Oster has withdrawn as associatel counsel in this action as he is no longer with Liberty Counsel. Mathew Staver and Erik Stanley remains assigned. (jmb) (Entered: 10/22/2004)
10/18/2004	83	USCA Scheduling Order #1: as to 79 Notice of Appeal filed by Antonio Peck. USCA Case No. 04-4950-cv. Appealed to Second Circuit. Appeal Record due by 11/5/2004. (jmb) (Entered: 10/22/2004)
11/08/2004		Certified and Transmitted Index to Record on Appeal to US Court of Appeals, Re: 79 Notice of Appeal. (jmb) (Entered: 11/08/2004)
11/19/2004	84	NOTICE of Docketing Record on Appeal from USCA, Re: 79 Notice of Appeal filed by Antonio Peck. USCA Case Number 04-4950 (jmb) (Entered: 11/22/2004)
07/19/2005		Certified and Transmitted Record on Appeal and Index to US Court of Appeals re 79 Notice of Appeal. (Note: Vincenza Mathias, USCA requesting physical file) (dmf) (Entered: 07/19/2005)
07/25/2005		USCA Case Number 04-4950, Re: 79 Notice of Appeal filed by Antonio Peck. (jmb) (Entered: 08/04/2005)
07/25/2005	85	NOTICE OF RETURN OF INDEX. Second Circuit Court of Appeals case # assigned is 04-4950-cv. (jmb) (Entered: 08/04/2005)